Filed 6/6/07 In re Monique P. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re MONIQUE P. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY DEPARTMENT OF CHILDREN'S SERVICES, Plaintiff and Respondent, v. CHRISTINA H., Defendant and Appellant.	E041681 (Super.Ct.No. J199218-19, J202542) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Robert G. Fowler, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and Appellant.

Ruth E. Stringer, County Counsel, and Julie J. Surber, Deputy County Counsel, for Plaintiff and Respondent.

Konrad S. Lee, under appointment by the Court of Appeal, for Minors.

I. INTRODUCTION

Appellant Christina H. (mother) appeals from an order terminating her parental rights to her three children: Robert, Jr., Monique, and Priscilla. The order was made at a hearing held pursuant to Welfare and Institutions Code section 366.26.[1] Mother contends: (1) the court abused its discretion in denying her oral motion to continue the section 366.26 hearing; and (2) the court erred in failing to consider the so-called "beneficial relationship exception" to adoption under section 366.26, subdivision (c)(1)(A).[2] We reject these contentions and affirm.

II. SUMMARY OF FACTS AND PROCEDURAL HISTORY

In January 2005, DCS filed petitions under section 300 concerning Robert, Jr. (then two years old) and Monique (then 10 months old). Regarding Monique, DCS alleged that her father, Robert P. (father), caused serious physical harm and committed severe physical abuse against the child when he grabbed her and broke two bones in her right arm. (§ 300, subds. (a) & (e).) Based upon this incident, DCS alleged in Robert, Jr.'s petition that the abuse against Monique created a substantial risk that Robert, Jr. would be abused or neglected. (§ 300, subd. (j).) In both petitions, DCS further alleged

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[1] All further statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

[2] Counsel for the children filed a letter brief joining in the San Bernardino County Department of Children's Services's (DCS) arguments that the orders made at the section 366.26 hearing be affirmed.

that the children's parents have a history of substance abuse that may prevent them from safely and adequately parenting the children (§ 300, subd. (b)), and that mother's whereabouts are unknown "as is her willingness and ability to safely and adequately parent the children" (§ 300, subd. (g)).

In February 2005, DCS amended the petitions to add allegations that mother and father have a history of engaging in domestic violence with each other, which may put the children at risk of physical and emotional abuse. (§ 300, subd. (b).)

At a jurisdictional/dispositional hearing held in February 2005, the court found each of the allegations in the amended petitions true, declared the children dependents of the court, and removed them from the parents' custody. The court approved a reunification plan and ordered supervised visits between the parents and children.

Mother gave birth to Priscilla in June 2005. The day after her birth, a social worker took Priscilla into custody after mother and Priscilla tested positive for illegal drugs. The next day, DCS filed a petition concerning Priscilla under section 300, subdivisions (b) and (j), based upon mother's and father's substance abuse problems and the physical abuse suffered by Monique. The court found the allegations true, declared Priscilla a dependent of the court, removed her from her parents' custody, approved a reunification plan, and ordered supervised visits.

The parents did not comply with their reunification plans. Mother failed to maintain regular contact with the social worker, dropped out of programs, and did not drug test when requested by the court and the social worker. The parents' record of visitation was described by the social worker at different times as "erratic[]," "sporadic,"

and "problematic." As a result, the children did "not perceive them as the parents." When visits did occur, the children paid little attention to the parents.

In February 2006, the court terminated reunification services and set a hearing to be held pursuant to section 366.26.

In March 2006, DCS requested an order that the parents be limited to one visit per month because the parents' pattern of "irregular visits and no shows causes Robert[,] Jr. great anxiety and adversely affects his behavior." (Capitalization omitted.) The court granted the order. Subsequent problems relating to mother's cancellation of scheduled visits eventually led the court to suspend all visitation until the section 366.26 hearing.

On the date of the scheduled section 366.26 hearing, mother was present in court. Father requested that the matter be set for a contested hearing, and mother joined in the request. Counsel for DCS informed the court that the prospective adoptive home may not be suitable for the children. The court informed counsel that this "will not be one of the issues to be addressed at the [section 366.26 hearing]." The court set a settlement conference for October 13, 2006, and a contested section 366.26 hearing for October 19, 2006. The court ordered mother to appear at both.

Mother did not appear for the settlement conference. Her counsel informed the court that mother had been "taken back into custody." When asked where she was taken into custody, counsel said, "I would imagine it's [Los Angeles] County." The court stated that it would order that she be transported to the section 366.26 hearing if she is in San Bernardino, but that it could not order her transported from Los Angeles.

The section 366.26 hearing took place in the afternoon of October 19, 2006. At the outset of the hearing, mother's counsel informed the court that he had just received information that mother had been released from jail in Norwalk, in Los Angeles County. He told the court, "I was going to request a continuance if I can get her here." The court asked counsel if he had any way to get in contact with her. Counsel said, "I have numbers. I can try calling her but I just found out this prior to the hearing. . . ."

The court inquired of DCS's counsel, who said, "[w]e're ready to proceed. Mom has been noticed and I think she told the clerk she knew there was a hearing today."

The court denied the request for a continuance and proceeded with the section 366.26 hearing.

Counsel for DCS submitted various reports without objection. When mother's counsel was asked if he had any affirmative evidence, he stated that he had none, and then stated an objection "for the record to the recommendations." He presented no argument. Counsel for the children agreed that the children were adoptable, but expressed concern that the placement with the prospective adoptive parents was "marginal." The court stated that the placement of the children would be discussed "at a future date." The court thereafter found that the children were adoptable, and ordered that mother's and father's parental rights be terminated.

III. ANALYSIS

A. *Denial of Continuance*

Mother argues that the court erred in denying her counsel's oral request for a continuance of the section 366.26 hearing. A request or motion for a continuance is

governed by section 352. Section 352, subdivision (a) provides, in relevant part: "Upon request of counsel for the parent, guardian, minor, or petitioner, the court may continue any hearing under this chapter beyond the time limit within which the hearing is otherwise required to be held, provided that no continuance shall be granted that is contrary to the interest of the minor. In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements. [¶] Continuances shall be granted only upon a showing of good cause and only for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance. Neither a stipulation between counsel nor the convenience of the parties is in and of itself a good cause. Further, neither a pending criminal prosecution nor family law matter shall be considered in and of itself as good cause." (See also Cal. Rules of Court, rule 1422(a)(2).)[3]

The statute further requires that, if a "continuance is granted, the facts proven which require the continuance shall be entered upon the minutes of the court." (§ 352, subd. (a).) There is no requirement that the record disclose facts supporting a *denial* of a continuance.

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[3] Effective January 1, 2007, rule 1422 has been renumbered as rule 5.550. For the sake of clarity, we will refer to the California Rules of Court under their former rule numbers.

A motion for a continuance requires written notice of the motion and supporting documents "detailing specific facts showing that a continuance is necessary" served at least two days prior to the hearing on the motion. (§ 352, subd. (a).) However, an oral motion for a continuance may be made if good cause is shown. (*Ibid.*)

Courts have interpreted the policy behind section 352 as "an express discouragement of continuances. [Citation.] The court's denial of a request for continuance will not be overturned on appeal absent an abuse of discretion. [Citation.] Discretion is abused when a decision is arbitrary, capricious or patently absurd and results in a manifest miscarriage of justice. [Citation.]" (*In re Karla C.* (2003) 113 Cal.App.4th 166, 179-180.) "'The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.' [Citations.]" (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1066.)

Here, Robert, Jr. and Monique had been dependents of the court and in foster care for 21 months. Priscilla, for her entire 16-month life. They deserved the permanency and stability the dependency system is intended to provide. It was in their interests to proceed with the hearing. To overcome this, mother's counsel supported his request for a continuance with only his statements that mother had been released from jail and he may be able to get in contact with her. Significantly, counsel gave no indication that mother would testify or offer any other evidence at the hearing if the hearing was continued. Nor

did he argue or suggest that mother would be prejudiced in any way by her absence at the hearing, or that her presence might have some affect on the outcome of the hearing. He did not indicate how long of a continuance would be needed. Under these circumstances, the court did not abuse its discretion in denying the request.

Mother contends that the placement of the children with a prospective adoptive family "was in issue" at the time of the section 366.26 hearing, and therefore "there really was nowhere for the children to go." Even if this argument was not forfeited by the failure to raise it below, it is based upon speculation that the identified prospective adoptive parents would be found unsuitable and the children's placement delayed. Such speculation does not establish an abuse of discretion.

Mother relies upon *In re Dolly A.* (1986) 177 Cal.App.3d 195. In that case, the appellant father was criminally charged with lewd and lascivious conduct against his daughter, and the child was made a dependent of the court. The child was placed with her mother. The father sought a continuance of the dependency proceeding pending completion of the criminal case. The court denied the request. (*Id.* at p. 198.) On appeal, the father argued the denial of the continuance effectively forced him to choose between testifying at the dependency proceeding (and risk having his testimony used in his criminal prosecution) or not testifying at the dependency hearing (and risk losing custody of the child). (*Id.* at p. 200.) The Court of Appeal agreed, and reversed. "In this instance, where denial of a continuance forced defendant to elect between giving up his right not to be deposed as a criminal defendant and his right to testify on his own behalf

in the proceeding to deprive him of custody of his daughter, we find it was an abuse of discretion to deny the continuance." (*Id.* at p. 201.)

In re Dolly A. is inapposite. Here, there is nothing in the record that indicates mother decided not to testify at the section 366.26 hearing because her testimony might be used against her in a criminal proceeding. Indeed, there is nothing in the record that suggests that mother was the subject of an ongoing criminal case or that she had any intention or desire to testify in the dependency proceeding or to present evidence of any kind. Nevertheless, mother contends that she was faced with a Hobson's choice:[4] escape from jail to attend the dependency proceeding or remain in custody and miss the opportunity to testify at the section 366.26 hearing. We do not find the analogy fitting. Unlike the father in *In re Dolly*, who had a choice to testify or not testify (albeit with undesirable consequences associated with each choice), mother in our case was never given a choice to escape or not to escape from jail (or, at least, not a choice we will recognize).

B. *Beneficial Relationship Exception to Adoption*

Mother argues that the court erred in failing to find an exception to the termination of parental rights under what is commonly referred to as the beneficial relationship exception. (See § 366.26**,** subd. (c)(1)(A).) This exception applies where "[t]he parents

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4 "A hobson's choice is defined as either 'an apparent freedom to take or reject something offered when in actual fact no such freedom exists' (Webster's 3d New Internat. Dict. (2002) p. 1076, col. 1), or 'the necessity of accepting one of two equally objectionable things' (*ibid*.)." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1311 (dis. opn. of Werdeger, J.)

. . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (*Ibid.*) The parents have the burden of proving that the beneficial relationship exception applies. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826; Cal. Rules of Court, rule 1463(e)(3).)[5]

"The juvenile court does not have a sua sponte duty to determine whether an exception to adoption applies." (*In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1295.) A parent who fails to raise an exception to the termination of parental rights below, waives the right to raise the issue on appeal. (*Ibid.*; *In re Erik P.* (2002) 104 Cal.App.4th 395, 402-403.) This rule was explained in *In re Erik P.*: "The application of any of the exceptions enumerated in section 366.26, subdivision (c)(1) depends entirely on a detailed analysis of the relevant facts by the juvenile court. [Citations.] If a parent fails to raise one of the exceptions at the hearing, not only does this deprive the juvenile court of the ability to evaluate the critical facts and make the necessary findings, but it also deprives this court of a sufficient factual record from which to conclude whether the trial court's determination is supported by substantial evidence. [Citation.] Allowing [a parent] to raise the exception for the first time on appeal would be inconsistent with this court's role of reviewing orders terminating parental rights for the sufficiency of the evidence." (*Ibid.*)

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[5] California Rules of Court, rule 1463 has been renumbered as rule 5.725.

Mother never raised this exception (or any argument against the termination of parental rights) before the trial court. Accordingly, she has forfeited the argument on appeal.

Even if the claim were not forfeited, it is without merit. There is no evidence of a parental bond between mother and any of the children. The children paid little attention to mother during visits and, according to the social worker, did "not perceive [mother and father] as the parents." Mother nevertheless asserts that "Robert[, Jr.] had an attachment to his family, to his mother, and the separation was harmful and confusing. Robert[, Jr.] had an emotional benefit to having [mother] involved in his life." These vague statements of a parental benefit were made without citation to the record and are not supported by the record.

IV. DISPOSITION

The orders made at the section 366.26 hearing are affirmed.

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/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ Richli
J.